CALIFORNIA STATE MEDIATION

AND CONCILIATION SERVICE

IN THE MATTER OF THE APPEAL FROM TERMINATION OF XXXXX, Appellant, and CITY OF ZZZZZ, Respondent.	)	Case No. ARB-00-0223 **ARBITRATION AWARD** Ernest S. Gould, Arbitrator

1.

INTRODUCTION

Effective September 26, 2000, XXXXX (hereinafter the "Appellant") was terminated from his employment as a Police Officer with the City of ZZZZZ Police Department (hereinafter the "City" or the "Department"). As a result of the allegations which led to the termination, the Department conducted an Internal Affairs investigation. Prior to his discharge, Appellant had been notified in writing by Interoffice Memo dated August 15, 2000, of the City's intention to dismiss him from employment. A Skelly hearing regarding the charges was scheduled for September 5, 2000, at which time Appellant's counsel waived a Skelly hearing.

A timely appeal was made from the decision to terminate and the undersigned Arbitrator was selected by mutual agreement of the parties from a list provided by the California State Mediation and Conciliation Service to conduct the Hearing on this Appeal.

Hearings were conducted on January 10, 11 and 12, 2001. The proceedings were reported and transcribed by Michelle Hannah of Esquire Deposition Services, certified court reporters. Some references to this record are designated herein as Reporter's Transcript and abbreviated "R.T".

Appellant was represented by Darryl Mounger, Esq. of the firm of Mounger, Gonda & Seki, and the City was represented by Patricia A. Kinaga, Esq. of the firm of Seyfarth Shaw.

The Appellant and the City filed written closing briefs and the record herein was closed on May 29, 2001. The matter was submitted for binding Arbitration pursuant to the City of ZZZZZ's Grievance Procedure set forth in the City of ZZZZZ Personnel Policy and Procedure Manual.

2.

BACKGROUND OF THE CASE

In April of 2000, Appellant had been a Police Officer with the City of ZZZZZ Police Department for a little over five years. He had been assigned to patrol duty during that entire time.

He was terminated after an incident (hereinafter sometimes the "Incident") which occurred during the early morning hours of April 14, 2000. It was alleged that, while attempting to return a runaway juvenile to a group home, Appellant unjustifiably forced entry into the home and used physical force against the on-duty group home supervisor, Breata Simpson, causing her bodily injury in the process.

As a result of this Incident, the Department made five specific allegations against the Appellant, as follows:

Allegation No. 1:

That Appellant used excessive force against Breata Simpson as he entered the group home on Wegman Drive that she was supervising, in violation of ZZZZZ Police Department Policy Sections 4.30 C and 4.30 D.3.

Allegation No. 2:

That the Appellant violated ZZZZZ Police Department Policy Section 2.23 A which provides that an employee of the Department may be disciplined for the commission of a felony or misdemeanor under any local, state or federal law, and that in the course of the incident at the group home, the Appellant committed a trespass to the residence in violation of *California Penal Code* ' 602.5; an assault

by a public officer in violation of *California Penal Code* ' 149; and a battery in violation of *California Penal Code* '242.

Allegation No. 3:

That in attempting to return the juvenile to the group home, Appellant violated Police Department Policy Section 5.41 C.7.b.5 in failing to consult with a supervisor prior to taking action.

Allegation No. 4:

That in attempting to return the juvenile to the group home, Appellant exceeded lawful police officer powers by unreasonable, unlawful or excessive conduct, in violation of Police Department Policy Section 2.23 W.

Allegation No. 5:

That Appellant's conduct toward Breata Simpson was discourteous.

Appellant's termination was ordered by the Chief of Police based upon the alleged violations of the above sections of the ZZZZZ Police Department Policy and Procedures Manual, a review of three prior disciplinary actions against Appellant, other performance considerations, and comments in Appellant's performance evaluations. These are discussed in more detail below.

A copy of the Notice of Dismissal was introduced in evidence as the City's Exhibit "M."[1]

The aforesaid Police Department Policy Sections, together with the ZZZZZ City Personnel Policy and Procedure Manual regarding "Grievance Procedure for Fire and Police Unit Employees," were the only documents submitted to the Arbitrator with respect to employer-employee relations between the City of ZZZZZ and the Appellant herein. The submission to Arbitration herein did not include any stipulation regarding the use or interpretation of external law in determining the issues presented herein.

[1] The City's exhibits herein are lettered "A' through ACC" The Appellant offered no exhibits. In addition to the City's exhibits, the Arbitrator marked four exhibits as Hearing Officer's Exhibits "1" through "4" A separate Exhibit List is appended to this Award.

3.

ISSUES

The general issues presented in this Appeal are as follows:

1. Are the allegations contained in the City's Notice of Termination dated September 26, 2000 (Exhibit "M"), true?
2. If any or all are true, is termination the appropriate discipline therefor?

4.

SUMMARY OF EVIDENCE

It is undisputed that in the late night hours of April 13, 2000, Appellant and his partner, Officer xxxxx, picked up two juveniles who were brothers and, after calling the police dispatcher regarding the juveniles, were advised that they were both runaways from group homes but, according to the police dispatcher, there were no warrants outstanding for either boy. The Dispatcher advised Appellant and his partner that the boys were from two different locations of the same group home, one located in the City of ZZZZZ and one in the outlying community of Xxxxx.

The Officers returned one of the runaway brothers to the first group home in ZZZZZ but the adult in charge of that home initially refused to take the juvenile in. While still at that location, the Appellant contacted a supervisor, Sergeant xxxxx, by radio. A transcript of this radio communication was entered in evidence as Exhibit "A" During that radio communication, Appellant reported to Sergeant xxxxx that the man in charge of the first group home said he was full and could not take the juvenile back. Appellant asked for confirmation that the group home, as the party reporting the juvenile missing, was obligated to take the juvenile back. Sergeant xxxxx stated:

> "They're gonna have, they reported them as runaway. They're responsible for them. They can't throw them out and expect us to deal with it. The only other alternative that you have is to see if a safehouse will take them".

Appellant responded: "Yeah, my understanding is they're full too". Sergeant xxxxx then tated:

"Then ... we don't have any place for them then they're gonna have to take them".

The transcript (Exhibit "A") further reflects that Appellant convinced the man in charge of the first group home to take the first juvenile in. Appellant then radioed Sergeant xxxxx again to advise xxxxx that the juvenile was inside, and that Appellant told the man in charge that "... if he kicks him [the juvenile] out, he's going to be arrested for abandoning a juvenile and I think he's gonna accept him but you might get a call". In this second radio communication, Appellant also told Sergeant xxxxx that "... I wasn't gonna let him stand there, kick the kid out". xxxxx responded: "Okay, sounds good, just make sure you document it real well in the report. If they call, I'll take care of it".

Appellant and his partner then proceeded to drive the second juvenile runaway, Robert Felix, to the second group home in xxxxx, apparently a 15 or 20 minute drive from the first group home in the City of ZZZZZ.

It is further undisputed that the second group home was located at 6917 Wegman Drive in xxxxx, and that it was a group home located in a single family home in a residential area. It was operated by Cedric Young Group Homes, and was under contract to operate such a group home for boys aged 14 to 17 who were either on probation or had been placed there by the ZZZZZ County Department of Children and Family Services. The group home was not open to the public.

Breata Simpson was the adult in charge of this second group home. She was on duty from approximately 9:00 p.m. on April 13th through 7:00 or 8:00 a.m. on April 14, 2000, her normal shift. At the time, Ms. Simpson had worked at that group home for only about three weeks and had not previously handled the situation of a runaway being returned to that group home.

Prior to the Officers' arrival with the second juvenile, a police dispatcher telephoned Ms. Simpson to advise her that two runaways were being returned by the Officers. Not knowing what to do, Ms. Simpson telephoned her supervisor, Betty Young, at Ms. Young's home to ascertain what the proper procedure for accepting juveniles would be. Ms. Young advised Ms. Simpson that Young had already spoken to a supervisor at Juvenile Hall and that when the Officers arrived, Simpson should give the Officers the name and phone number of that Juvenile

Hall supervisor, since the supervisor was already aware of these juveniles and had agreed to accept them. Apparently there were, in fact, arrest warrants outstanding for both juveniles, but these warrants had not yet been entered into the system and therefore were not picked up when the police dispatcher checked for warrants, or the police dispatcher had neglected to check with Juvenile Hall. Simpson wrote the name and phone number of the Juvenile Hall supervisor, a Mr. Vargas, on a piece of paper, in order to give it to the Officers when they arrived.

Around midnight, Appellant and his partner, Officer xxxxx, arrived at the second group home on Wegman with the second juvenile, Robert Felix. The Officers' shift ended at 1:00 a.m. (having begun at 3:00 p.m. the preceding day).

It is undisputed that Officer XXXXX knocked on the front door and that Ms. Simpson opened the door slightly, possibly as much as a foot, so her right side remained behind the door and her left side was in the opening while she spoke to the Appellant.

It is clear that Appellant tried to get Ms. Simpson to accept the second runaway into the group home and that, acting on instructions from her supervisor, Ms. Simpson refused to do so.

It is also clear that, according to his own reckoning, Appellant turned on a tape recorder carried on his person at six minutes after midnight (12:06 a.m. the morning of April 14, 2000). That tape was in evidence as Exhibit "B-2"

That tape and a transcript of that taped conversation (Exhibit "B-1") between Appellant and Ms. Simpson shows that Appellant ordered Simpson to take the juvenile back into the group home and told her that if she didn't take him, she would be abandoning a juvenile. Simpson responded that she had already spoken to a Mr. Vargas at the ZZZZZ Department, and that Vargas said that she didn't have to take the juvenile because they will take him. Appellant responded: "They may need to take him, but they need to take him from here, because we're not driving all over the county."[2]

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[2] Exhibit "B-1"is a transcript of part of the conversations that Appellant had recorded with the man in charge of the first group home in ZZZZZ and subsequently with Ms. Simpson. That transcript notes that Appellant successfully placed the first juvenile in the first group home at 23:46 hours on April 13th (11:46 p.m.). After conversing with Ms. Simpson, who refused to take the other juvenile into the second group home, Appellant turned his tape recorder on again and noted that it was now six minutes after midnight on the morning of April 14th. It therefore appears that it took between 15 and 20 minutes for Appellant to drive from the first group home in the City of ZZZZZ to the second group home in xxxxx.

It is clear from the tape that Appellant then ordered Simpson to "step back from the door" three different times. The tape and transcript reflect that Simpson responded, "I can't take him" and "I cannot do that" and that her next response was inaudible, and she is then heard to say, "Oh, oh," and then something inaudible.

What occurred at or just before that point in time is sharply disputed.

Ms. Simpson testified that she never consented to Appellant entering the group home, and that she remained at the partially opened door trying to convince Appellant to call the Juvenile Hall supervisor, and trying to give Appellant the piece of paper with the name and phone number of the Juvenile Hall supervisor. Simpson testified that the Appellant then pushed the door in on her, injuring her right ankle which was immediately behind the door, and thereafter placing his forearm on her neck and pushing her back in a northwesterly direction against a wood table. (According to the diagram on Exhibit "S," that table was approximately nine feet into the interior of the group home.) She tried to scream but gagged because of the pressure on her throat. Appellant then threw her to the side (in an easterly direction), causing her to fall backward and strike her left arm and back against a metal railing which separated the entryway and living room of the group home.[3] She sought medical treatment the morning after the Incident, and was in pain afterward for a week or a week and a half.

The transcript and tape (Exhibits "B-1" and "B-2," respectively) continue on after Appellant is heard to tell someone to "come on in here. Come on," and Ms. Simpson again stating, "Sir, I cannot have him B" and Appellant stating: "Don't fight with me ma'am, or you'll go to jail." Ms. Simpson is also heard to complain about being thrown all over the floor for no reason, and stating to Appellant that he doesn't "... have the right to come in here like this ...."

Appellant is then heard to advise Simpson that it is "... a misdemeanor, punishable by up to one year in jail to interfere with, or resist a police officer ...." and that: "When I order you to

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[3] Two photographs of the interior (as well as a diagram of the relevant portion of the house) were admitted as Exhibit S. A copy of that Exhibit S is appended to this Award. The writing in script on Exhibit S was placed there by the Arbitrator, based upon the testimony of several witnesses in this case. The abbreviation "S" thereon stands for Ms. Simpson.

step back from the door and you refused, that is a misdemeanor."[4]

Simpson also testified that she never pushed the door shut on the Appellant, nor did she ever shut the door separating the two officers. As a matter of fact, she testified that the door was open and, so far as she knew, Officer xxxxx could see into the house while the Appellant was pushing her back into the hallway (but she really couldn't say for sure exactly what xxxxx actually did see).

Appellant's testimony as to how he got into the group home, and what occurred thereafter, is quite different. Appellant testified that, prior to putting on his tape recorder, Ms. Simpson had several times told him to call her supervisor and that he had to take the juvenile to Juvenile Hall. He didn't attempt to confirm the information she was giving him because he had already "run" the juvenile through the police dispatcher and Simpson "... wasn't giving me any information" (R.T. 260). He testified that Simpson said her supervisor had told her to tell the police to take the juvenile to Juvenile Hall. He did not think to talk to Simpson's supervisor to try to get a confirmation since "we had already talked through official channels, so that was not new information ..." (R.T. 261). To his mind, the police dispatcher had already checked the status of both runaway juveniles, including Juvenile Hall. No warrants were disclosed. Appellant's knowledge was that Juvenile Hall would not take a juvenile unless there were criminal charges outstanding. Appellant had no knowledge of who Simpson's supervisor might have spoken to. He did not ask Simpson who Mr. Vargas was, and did not ask her what "department" she was referring to.

Appellant first testified that Simpson's reference to "the ZZZZZ Department" was understood by him to mean Juvenile Hall (R.T. 265:9-12; 267:22-24), but he also later testified that he didn't know what facility Simpson was talking about (R.T. 268:12-13). As noted in Exhibits "B-1" and "B-2," after the tape recorder was turned on, Simpson stated that she had "... already spoken to Mr. Vargas at the ZZZZZ Department, and he says that we don't have to take him because if [sic] they will take him ...." At that point Appellant interrupted and told her: "They may need to take him, but they need to take him from here, because we're not driving all

[4] The entire transcript (Exhibit "B-1") is also appended to this Award.

over the county."

Appellant further testified that he ordered her three or four times to "step back from the door" and, after one such order, "... she stepped back slightly and the door opened a little bit more and that's when I stepped in" the doorway (R.T. 269). She refused to step back from the door after at least three of those orders to do so. Everything happened quickly after that point, and it was all over in a couple of seconds. He did not consider further consulting his own supervisor during those couple of seconds.

At one point Appellant testified that it was very hard to pin down where in the Exhibit "B-1" transcript things occurred but "... by the time I was saying, get back from the door, at that point she was trying to close the door. And I was already B had already pushed her back into the house, and I was in the house, and she was closing the door on my partner at that point" (R.T. 272:10-17).

Appellant testified that when Simpson opened the door a little bit, he put his foot in over the threshold and got pinned in the doorway because Simpson pushed the door in on him (R.T. 283). He previously testified that as he stepped into the doorway, the door was pushed against him along his right upper body, along his clavicle (RT 282:10-20). He pushed back against the door with his left forearm and part of his right hand, telling her at the same time to get away from the door or let go of the door. He then pushed Simpson with his right forearm into her upper-body/chest area; he was pushing her back away from the door in a northeast direction. The door pressure was released and Simpson moved back from the door but she was still holding on to it, and with the force of his momentum pushing against her, Appellant ended up inside the group home. At that point, the door began to close because Simpson was closing the door and he was trying to keep the door open and pull her away from the door, because now she was separating Appellant from his partner, Officer xxxxx, who was still outside (R.T. 285).

While he was inside and still trying to pull her away from the door, Appellant testified that the door was suddenly pushed inward and he lost his grip on Simpson. He stumbled backward in a northwesterly angle and came up against the west wall of the entryway, approximately in the short space between the first bedroom door and the closet marked on the Exhibit "S" diagram (R.T. 284:17-287:3). At that point, Officer xxxxx came into the house with

the juvenile.

Appellant first testified that he did not think that Simpson opened the door wide enough to lead him to believe she was allowing him in, but that when, after several orders, "... she moved and opened the door further ..." he believed that "... she was complying with my order. That's what I believe she was doing, is complying with my order to step back from the door so the child could go back into the facility" (R.T. 275:9-20). He also testified that he initially put just one foot over the threshold (R.T. 276).

He further testified that he thought he had the right to enter the group home "... Because I felt that I had the right to place the child back into that facility, and to facilitate that, I could usher him into the entryway." (R.T. 277:10-14)

He also testified that he thought Simpson ***was*** indicating that it would be okay for him to enter the residence when she opened the door further and moved, but Simpson never said it was okay for him to enter and he never asked her whether it was all right (R.T. 278:22-279:12).

After this confrontation, Simpson was uncooperative in that she refused to give him her name and birth date and he tried to explain the *Penal Code* to her "in a very clear way" but she repeatedly said that she didn't understand. He told her that if she continued to refuse to obey him, she would be breaking the law. As reflected in the Exhibit "B-1" transcript, Appellant also told Simpson that when he ordered her to step back from the door, and she refused, that constituted a misdemeanor.

He also threatened to arrest and remove her from the group home, and thereafter charge her with felony child abandonment, if she refused to give her name and birth date. Simpson also repeated her request that the Appellant call Mr. Vargas at Juvenile Hall and Appellant responded, "We are not calling that number."

After the physical confrontation, Appellant called a supervisor, Sergeant Wiesmann, using a phone in the group home because the "radio traffic" was too weak from the xxxxx area.

As part of the Department's Internal Affairs investigation of this Incident, Appellant was interviewed by Sergeants McFall and Showalter on April 27, 2000. Appellant's counsel, Darryl Mounger, Esq., was present.

During that interview, Appellant stated that he never intended to enter the house but he

conceded crossing the threshold in order to put the juvenile inside. He further conceded that he had no consent, warrant or emergency justifying entry into the house.

He claimed, however, that his legal authority for entering the residence was (1) his "lawful order to take him [the juvenile] back into the home;" (2) Simpson's failure to provide for the juvenile by leaving him out in the street; and (3) her "contributing" [apparently to the delinquency of a minor] (Exhibit "BB-1," Pages 43-45). He didn't give any credence to what Simpson was trying to tell him regarding Juvenile Hall because he had to rely on information that he had already gotten from an official source.

During the IA interview, Appellant also stated that he didn't know who "Vargas" was and all Simpson mentioned was her own supervisor.

Appellant felt that he had already consulted his supervisor (by radioing Sergeant xxxxx when the first group home caretaker refused to accept the first juvenile).

Andrew Wiesmann testified on behalf of the Appellant. His testimony added nothing of value to the case. At the time of the Incident, Wiesmann had been a sergeant, but was reduced in rank to "officer" as a result of the Incident, and his failure to have a use of force report or a personnel complaint prepared regarding the matter, after speaking to Ms. Simpson that night on the phone.

Appellant's partner, Police Officer xxxxx, testified on behalf of the Appellant. xxxxx testified that he was present during this Incident at both group homes. At the second home, he was standing a couple of feet behind and to the right of Appellant on the front porch. The juvenile, Robert Felix, was seated in a chair outside and near the home's entranceway.

xxxxx testified that it was Appellant who had radioed the dispatcher for a background check on both of the juveniles they had picked up that evening. Officer xxxxx also testified that Appellant insisted that Ms. Simpson take the juvenile back and Appellant began to walk through the doorway. Appellant pushed the doorway with his left hand and pushed Simpson away with his right hand (R.T. 413:6-11).

Simpson was still objecting when Appellant entered the doorway (R.T. 427:22-24). xxxxx looked away to make sure that the juvenile didn't leave, and when he turned his attention back to the doorway, the door was closing and both Appellant and Simpson were inside the

house and the door was rapidly closing (R.T. 415:3-16). He had no idea what was going on inside the house. He was concerned to get in quickly and find out, so he leaned on the door to open it but he felt resistance on the other side of the door, so he pushed harder and the door opened.

As he entered, Appellant was near the wall on the west side of the room, between the bedroom door and the closet door [see Exhibit "S"], and Simpson was on the floor near the point where the wrought iron railing in the entryway to the living room begins (R.T. 415:21-417:23).

He described Simpson getting up and being angry, incredulous, confused about what was going on, and appalled.

Notwithstanding his earlier testimony that he saw Appellant push Simpson at the doorway, he also testified that he did not see any "reportable use of force" that night against Simpson, and that the only thing he ever saw was [Appellant's] hand on [Simpson's] shoulder, which doesn't constitute a use of force (R.T. 432). He did not hear Simpson complain of any injury or see any actual injury on her. She did "mention" her throat that evening, but she did not make any complaint of injury to him (R.T. 433:8-10; 436:24-25).

xxxxx does not know how the door started to close after Appellant entered (R.T. 428:20-22).

xxxxx recalled being interviewed by Internal Affairs with regard to this Incident and telling the investigator that forcing entry into the house was not his decision, and that he was surprised by it. He also told the IA investigator that he [xxxxx] did not see any immediate need to enter, and that it was a call that he would not have made (R.T. 433:17-436:15).

Describing the entry, Officer xxxxx testified:

> "A: It's a double door, and this was the door on the left that opens; it's a left-handed door. And as he [Appellant] entered the doorway, he was met with resistance. She pushed the door back.
>
> Q [By Mr. Mounger]: She pushed the door back. Go on.

> A: But the reaction was immediate. As I tell it, it sounds like it was a back and forth, but it wasn't. It was an immediate push back. It looked like Mike was getting pinned in the door ..." (R.T. 412:18-413:1).

The Department called ZZZZZ Police Sergeant xxxxx, who testified that he received two radio communications from the Appellant late in the evening on April 13. These communications were recorded and a transcription thereof was the Department's Exhibit "A." He testified that returning runaway juveniles to a group home was a nightly occurrence. The fact that the home was full was not an acceptable excuse to refuse taking the juvenile.

He never authorized the use of force to effect entry into this group home. Officers are not given training regarding use of force to effect entry into such a group home. As a matter of fact, force would not be authorized in advance for any purpose, barring a SWAT situation. He himself would never authorize force to return a child to a group home because it was just not appropriate.

If an officer requests a police dispatcher to "run this person all round," it means that the dispatcher should check out that person in every system or source available to the dispatcher. Failure of a police dispatcher to advise of warrants would not, however, justify the use of force in this type of situation.

An officer can certainly assist a child to get into his own home, or a group home, but this particular group home was not open to the public. Appellant could not enter without consent, and the Appellant could not force his way in if refused entry.

Appellant should have contacted a supervisor in accordance with Department policy.

The Appellant never contacted Sergeant xxxxx with regard to Ms. Simpson's refusal to permit entry. Had Appellant done so, Sergeant xxxxx testified that he would have gone over to the group home and found some other alternative.

On cross-examination, Sergeant xxxxx testified that if a police officer had been hit by a door, the person causing that would usually be arrested for battery on the officer but, if the officer's entry had been illegal, no arrest would be made.

The Department also called two command officers, as well as the present Chief of Police.

At the time of the Incident, Deputy Chief Audrey Wilson was a police captain in charge of all field operations. She reviewed the Internal Affairs investigation made in this matter, as well as the Appellant's personnel file. She recommended termination.

She clarified the differences between a "reprimand," an "admonishment," and "counseling." A reprimand is permanent discipline, whereas an admonishment is not permanent discipline but is retained only until the next performance evaluation and then purged from the officer's record. Counseling is purged at the next evaluation period. In reviewing Appellant's record, however, she considered all three.

With respect to Appellant's Performance Evaluation for the period from August, 1997 to August, 1998, she noted that the Appellant had been rated "below standard" regarding courtesy and regarding judgment, and it was noted that this employee "Tends to be rude and abrupt. Can be courteous to others; however is not consistent in this regard." She also noted that the rating officer stated that Appellant had been inconsistent in his ability to control situations and had trouble dealing with situations which were stressful.

This Evaluation also noted that Appellant becomes very defensive when his authority is questioned, and that he had occasions where he "rushed" stressful situations rather than calling for assistance from other officers. Appellant had also been marked down regarding "courtesy" because of an incident at a Kaiser Hospital, where a physician felt that he had been insulted by the officer. The rating officer also noted that there had been a number of complaints regarding courtesy and Deputy Chief Wilson was concerned about that. She reviewed the entirety of this Evaluation Report (R.T. 306:1-308:9).

This Evaluation Report itself noted that, during this rating period, the Appellant received a reprimand for a sustained citizen's complaint, improper procedures and poor service. He also received an admonishment for a sustained citizen's complaint, discourtesy and improper procedures. He was also counseled in the areas of reporting procedures, courtesy, judgment, self-expression and stability. The report also rated Appellant "below standard" for stability in the category "Frequently loses control of situations. Cannot be relied upon to maintain self-control and poise."

With regard to Appellant's Evaluation for the period February, 1996 to August, 1996, Wilson noted that the Appellant needed to improve his judgment in situations where his authority was challenged. The rater noted that when Appellant's authority was challenged, Appellant reacted with stronger authority, thereby escalating the conflict. Appellant was advised to be less domineering when explaining his position.

Wilson also testified that the Appellant received copies of each of his own Evaluations and was asked to sign off on them. Wilson noted that in Appellant's final Probationary Evaluation (the 1996 evaluation), he was cited for reacting inappropriately when his authority was challenged, and in the 1998 Evaluation, he was cited for similar demeanor and there were instances of formal counseling with Appellant.

She felt that the April 13, 2000 Incident at the group home was very serious and represented an escalation of these earlier behaviors which had been discussed with Appellant on more than one occasion. She described the Appellant's actions at the second group home on April 13 as "egregious" and "inappropriate," given the other options available for placing the juvenile or for looking for guidance on how to place the juvenile.

The Department has never trained its officers to use force to effect entry in a group home situation where the caretaker is refusing entry. To her knowledge, a group home is not open to the public.

Based upon Appellant's previous disciplinary actions and the counseling which, in her opinion, had no impact on Appellant's ability to correct his behavior, she came to the conclusion that only termination was an appropriate level of discipline.

In her opinion, Officer XXXXX should have stepped back when he experienced resistance and permitted Simpson to close the door. Appellant's proper action would have been to call a supervisor at that point.

The options available to him with regard to placing the juvenile included contacting the Probation Department or Child Protective Services. Simpson's refusal to take the child was not a basis for arresting her. In Wilson's opinion, Simpson was within her rights to attempt to close the door because Appellant was illegally attempting to enter the group home. Wilson opined that the group home was a private residence licensed by the State, and that this did not mean that it

was a commercial dwelling unit.

On cross-examination, Wilson conceded that in his 1996 Evaluation, Appellant was rated as meeting standards regarding respect and courteous attitude. Wilson did consider the more current evaluation for the period August, 1998 to August, 1999 which, with one exception, indicated that Appellant either exceeds standards or is outstanding. She also considered that Appellant's evaluations indicated that he had received recognition for his interest and dedication, and that he was an extremely motivated employee. Notwithstanding this, she testified that she did not believe that Appellant was "trainable" to correct his deficiencies.

She equivocated but finally indicated that she thought that Appellant's actions at the first group home also played some role in her decision process. She was also critical because Appellant made no effort to contact Juvenile Hall in this Incident, and because there was no effort made to determine what alternatives there were to placement at the second group home. Specifically, there was no conversation with Ms. Simpson to find out what her objection was to taking the juvenile back; there was no contact or attempt to contact the safe house; and there was no police supervisor contacted. She would have recommended that Appellant step back from the door, call for a supervisor, and wait for the supervisor to arrive.

Under the facts of this Incident, and after reviewing Appellant's record, she would still have recommended termination even if there had been no admonishment and/or counseling noted in Appellant's personnel record. She was critical of Appellant's conduct at the first group home on Cascabel because the placement of the child was achieved in part by verbally intimidating the caretaker in charge there. Part of her recommendation for termination was based on what happened at that first group home. Even if nothing had occurred at the Cascabel house, however, she would have still recommended termination based on what happened at the second group home.

In her opinion, the Appellant was not acting in the "course and scope" of his position when he forced his way into the second group home. An illegal entry removes an officer's conduct from being in the course and scope of his official duties.

Captain Richard Dana also testified for the Department. He was the Commander of the Internal Affairs Unit when the Incident occurred and he provided closer than normal oversight of

the Internal Affairs investigation because of the seriousness of the alleged offenses.

Based upon his review of the Internal Affairs investigation, and his review of the tape (Exhibit "B-2") of the Incident, he is of the opinion that the Appellant acted unlawfully in attempting to impose his will on Simpson and demanding that she do things that she would not have been compelled to do legally, citing law that would be inaccurate, and adopting an overbearing and officious attitude. In his opinion, it was not lawful for Appellant to order Simpson out of the doorway, and then after a confrontation, demanding information from her consisting of her name and birth date, and thereafter threatening to arrest her for delaying and/or interfering with an officer. Appellant would not have been authorized to arrest her for child endangerment in refusing to accept the child, either.

Dana was also taken by the fact that there was no evidence that Appellant had ever checked the availability of any safe house for this juvenile. It was also clear that Appellant had failed to consult a supervisor when Simpson refused to admit the juvenile into the group home.

Captain Dana also testified that the Department's use of force policy was violated by Appellant because force cannot be used to get compliance with an order that's not legal. Also, if an entry is illegal, use of force in effecting that entry is not proper. The Internal Affairs investigation concluded that Appellant's entry was not legal and that Appellant should not have used force when Simpson resisted entry. Appellant could have just stepped back out of the doorway. Pushing Simpson at the doorway was a reportable use of force.

Captain Dana recommended that Appellant be terminated and he made this recommendation both to an interim Chief and to the permanent Chief of Police, Russ Leach. These recommendations were based, most importantly, on Appellant's lack of good judgment which casts a doubt on his ability to make good judgments in the future. In Dana's opinion, Appellant's actions in using force on Simpson were extremely unreasonable. Appellant should have called a supervisor and should have investigated the information with regard to Juvenile Hall and the supervisor there, Mr. Vargas.

In reaching his recommendation regarding termination, Captain Dana reviewed Appellant's personnel file and noted the two evaluations in 1996 and 1998 indicating that Appellant had difficulty when people challenged his authority.

Dana also noted a sustained discourtesy complaint against Appellant on April 9, 2000, during which Appellant wanted a doctor to sign a temporary commitment. The doctor complained of rudeness after the Appellant threatened to have the doctor's hospital closed down. Appellant hanging up on that doctor was only one part of the discourtesy alleged in that incident. Even if that particular incident had not occurred, Dana would still have recommended termination.

In reviewing this matter, Captain Dana believed that both the Appellant and Simpson were telling the truth.

After the physical confrontation, he does not believe that Simpson's lack of cooperation would have constituted a basis for arrest for resisting or obstructing an officer.

The Department also called its present Chief of Police, Russ Leach. Chief Leach was not the Chief of Police at the time of this Incident and had no personal knowledge of the matter. He was the final decision maker, however, and based his decision on the information provided to him by his subordinate command officers.

5.

DISCUSSION

The City has the burden of proving each material fact by a preponderance of the evidence. "Preponderance" of the evidence has been defined as 51% or more in favor of the establishment of a particular fact or position. In addition to *quantity* of evidence, however, the legal concept of preponderance of evidence also takes into account the *quality* of evidence offered. It is here that credibility often plays an important part.

In the instance case, however, credibility is not the main determining factor. Ms. Simpson appeared to be completely credible and even a close examination and comparison of her testimony at this Hearing as compared with her statement given to the Department's Internal Affairs investigators (Exhibit "BB-2" herein), revealed no substantial inconsistencies of any sort.

The same cannot be said of the Appellant but the inconsistencies in his testimony at this Hearing (and as compared with his other statements regarding the Incident) do not reflect a lack of credibility so much as a different view of his rights and actions as a police officer, combined

with a massive attempt to rationalize his conduct during each step of this Incident.

This Appeal took up three full days of hearing, involving the testimony of eight witnesses and filling 644 pages of reporter's transcript. In addition, the exhibits are estimated to exceed 400 pages. Two most able counsel presented their respective cases in a way that parsed and analyzed each aspect of the entry into the second group home, and gave the Incident an almost surreal sense of having been done "in slow motion".

The actual Incident, however, occurred with lightening speed. From the time that Appellant was taped saying, "They may need to take him, but they need to take him from here, because we're not driving all over the county", only seven or eight seconds elapsed during which time Appellant forced his way into the group home, pushed and then knocked Ms. Simpson down, and is heard to say (to either Officer xxxxx or the juvenile or both), "Come on in here, come on" (Exhibits "B-1" and "B-2").

Repeated listening to the tape recording (Exhibit "B-2") indicated that no more than eight seconds elapsed B and possibly less B because the tape demonstrates that all of the action took place so quickly that no one could accurately determine what action was occurring at what point in the tape. It just happened too fast.

The speed with which everything occurred was confirmed also by the testimony of Appellant's former partner, Officer xxxxx. xxxxx found himself in a difficult position at this Hearing. He understandably wanted to support his former partner as much as possible, and yet had to concede that he (xxxxx) would have handled the situation differently and that he was surprised that it turned violent. He attested to the speed of the entire Incident, testifying,

> "... As I tell it, it sounds like it was a back and forth, but it wasn't. It was an immediate push back. It looked like [Appellant] was getting pinned in the door ..." (R.T. 412:24-413:1).

xxxxx looked away to make sure that the juvenile wasn't taking off, and he wasn't, and when xxxxx looked back at the door, it was closing and both Appellant and Simpson were inside the house. xxxxx had no idea what was going on inside.

No one will ever know for sure exactly what happened in that seven to eight second interval. What can be determined from this record is that, after been repeatedly denied

permission to enter, Appellant just pushed the door open and entered. The pushing of that door open, the knocking of Ms. Simpson into a wood table on the west entryway wall (and approximately nine feet into the interior of the house), and then to the east and into a metal railing, all took place in one continuum in less than eight seconds. As stated by xxxxx, there was no "back and forth".

Appellant did not just put his right foot alone into the threshold of the partially opened door. By his own admission:

> "Almost immediately when I stepped over into the doorway, the door was forcibly pushed against me along my right upper body, the right side, I guess you'd say along my clavicle, so that I was pinned ..." (R.T. 282:15-20).

It thus appears that once he started into the house, Appellant immediately had half of his body in the house or it could not have been in contact with the door.

As timed on the tape, the rest of what occurred was an immediate continuum. Appellant continued into the house, pushing Ms. Simpson back as he advanced. She testified that she struck a small wooden table along the west wall of the entranceway and was then pushed in an easterly direction, where she fell and struck her back and left arm on a metal railing. (See Exhibit "S".)

The speed with which the entire Incident occurred also tends to belie Appellant's version of what happened in the house after he entered. Appellant asserted that Ms. Simpson was trying to close the door, even after Appellant entered, and that he was trying to pull her off the door when the door suddenly opened, causing Appellant to either stumble or move into the entranceway, and supposedly pushing Simpson into the entranceway too and ultimately onto the floor. Doubt is also cast on this version by Exhibit "V", which was a photograph of Ms. Simpson showing abrasion and redness on her upper chest area.[5]

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[5] The quality of the Department's Exhibit "V" was not good and it was apparently a xerox of a photograph. Another copy of the same document exhibited during the Hearing by Appellant's counsel, however, was not offered in evidence but was shown to the Arbitrator and clearly indicated the redness and abrasion to Ms. Simpson's upper chest. Appellant admitted pushing Ms. Simpson back and that he may well have made contact with her body in the upper chest area. The photos of Ms. Simpson (Exhibits "V", "W", and "X") attest to her injuries and the amount of force used on her. Those photographs were taken later during the day on April 14, 2000 by the

In short, Appellant's theory that he merely put one foot over the threshold, was thereafter pinned in the door and just defended himself by pushing on the door and Ms. Simpson, and thereafter just wound up in the house through momentum (or because his partner pushed the door in on him), just won't hold water. In the tape (Exhibit "B-2"), Appellant made no mention whatsoever of having been pinned in the door. In his initial report of the Incident, however, Appellant did assert that he had been pinned in the doorway (Exhibit "Z", Page 3) . The essential question, of course, is "Why was he in the doorway?"

Appellant's attempt to explain that is a series of bootstrapping statements which evade the main problem: he had no business stepping into or over the threshold in the first instance. In so doing, and in continuing to push his way into the house in the process, Appellant needlessly used force in a situation where it was inappropriate, and which violated both the law and Departmental policies. In short, Appellant provoked a confrontation and used force where it was entirely unnecessary.

He did so by unreasonably refusing to listen to and take account of the information offered to him by Ms. Simpson, to the effect that either her supervisor or a supervisor at Juvenile Hall needed to be contacted. Appellant's refusal to even listen to Ms. Simpson is unreasonable on its face. His attitude that anything she was trying to tell him was "worthless" because it came from an "unofficial source", is frightening in its implications.

Forcing his way into the home (by pushing the door in on Ms. Simpson) was in itself a use of force. He injured her ankle in the process. That use of force continued once he was inside the home by pushing her into a table and thereafter throwing her to the ground, where she struck a metal railing. All three of those aspects of his use of force were unnecessary and inappropriate.

The subsequent rationalization that Ms. Simpson did not appear to be injured or complain of injury did not retroactively justify the force (or excuse the failure to report the use of force). The rationalizations that Appellant only tried to defend himself at the doorway when he was supposedly "pinned" in the doorway, and that Simpson must have been injured "if at all" by the

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Department.

fact that she stumbled and fell when the doorway was pushed in (apparently by Officer xxxxx), just stretches credulity a bit too far.

It is true that Appellant met resistance when he tried to return the first juvenile to the first group home and, in that instance, he properly contacted Sergeant xxxxx, a supervisor, for instructions. Whether rightly or wrongly, xxxxx did confirm that group homes have to take the minors back if no safe house was available (Exhibit "A"). Did this justify the use of force at the second group home to effect entry? The question answers itself. Calling a supervisor while at the second group home, or calling Mr. Vargas at Juvenile Hall, could have avoided this entire Incident. Appellant's failure to do either violated Department policy and basic common sense.

The Allegations

1.

Use of Excessive Force in Entering the Group Home

No force was justified. No entry was justified. Therefore, *any* force used to effect entry was excessive.

The Department's Policy 4.30 C regarding Use of Force Guidelines provides, in part, that: "... Control may be achieved through verbalization techniques such as advice, warnings and persuasion, or by the use of physical force. Officers are permitted to use whatever force that is reasonable to protect others or themselves from bodily harm. The Department's Use of Force Guidelines must comply with applicable California and federal law...."

That Policy also provides, in part, that:

> "... verbal threats of violence, verbal abuse, or hesitancy by the suspect in following commands do not, in and of themselves, justify the use of physical force **without** additional facts and circumstances which, taken together, pose a threat of harm to the officer or others ...."

Captain Dana testified that, in his opinion, Appellant had engaged in egregious behavior during this Incident, and that this behavior constituted assault or trespass, or both. He further testified that, under the Department's Use of Force Guidelines, force cannot be used to obtain compliance with an order that's not legal. He further testified that if an entry was illegal, an officer could usually not use force in effecting it.

The Department's Internal Affairs investigation determined that the entry was not legal, and we concur. Appellant, therefore, should not have used force when Simpson denied entry. Appellant's proper action would have been to step back out of the doorway. Pushing Simpson at the doorway itself was a reportable use of force. It was not "self-defense" to being "pinned" in the doorway, if Simpson opened the door a crack while *still protesting* she could not let Appellant in. That is the conclusion from listening to the tape (Exhibit "B-2").

As noted below, Appellant's forced entry was both illegal and in violation of Departmental policy. Appellant's repeated commands to step aside and permit entry (in the face of repeated refusals) constituted illegal orders. Such illegal orders cannot be transformed into "interfering with an officer", and cannot justify the use of force. Under these circumstances, any use of force was excessive. The injury to Ms. Simpson also renders the force "excessive".

2.

Violation of Department Policy ' 2.23A, Which

Prohibits the Commission of Criminal Conduct

This allegation alleged the commission of three separate crimes, to-wit:

(a) Trespass to residence.

California Penal Code ' 602.5 provides as follows:

> "Every person other than a public officer or employee acting within the course and scope of his employment in performance of a duty imposed by law, who enters or remains in any noncommercial dwelling house, apartment, or other such place, without consent of the owner, his agent, or the person in lawful possession thereof, is guilty of a misdemeanor."

Appellant and his counsel have asserted that the group home in question here was a commercial dwelling house. The owner was licensed by a governmental agency and received compensation for keeping pre-delinquent or juvenile probationers in the home. Therefore, it was argued that the Appellant could not have violated *Penal Code* ' 602.5, since it was a commercial dwelling house.

The Department, on the other hand, asserted the group home was a private residence licensed by the State and therefore not commercial. It also asserted that a non-consentual entry into such a home violated the Departmental policy with respect to entering a sleeping area of a commercial dwelling absent consent, a warrant or exigent circumstances.

It is clear from the record herein that the group home in question is some kind of a hybrid: not strictly commercial and not strictly a private single-family residence. The record is silent as to whether the home was solely a group home or was occupied as a private residence as well. In light of that, and as a practical matter, it is unlikely that an on-duty police officer, on official business, would be prosecuted or convicted of a violation of ' 602.5 under the circumstances of this case. Most assuredly, any prosecutor would hesitate to bring such a prosecution involving such a hybrid residence.

The Department has failed to establish that Appellant's forced entry was illegal under

California Penal Code ' 602.5 and Appellant must be given the benefit of the doubt on that point.[6]

(b) Assault by a Public Officer.

California Penal Code ' 149 provides:

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[6] The question remains as to whether or not the Appellant's entry into the group home was "illegal". It clearly was. Even if not constituting a violation of *California Penal Code* ' 602.5, Appellant's actions in forcing his way into the group home constituted a violation of the Fourth Amendment to the U. S. Constitution, which prohibits police officers from making warrantless entries into a person's home unless the officers have probable cause to make an arrest *and* are presented with exigent circumstances. *Payton v. New York*, 445 U. S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *LaLonde v. County of ZZZZZ*, 204 F.3d 947, 954 (9th Cir. 2000).

In addition, although not charged against the Appellant, it would appear that Appellant's actions in forcing entry and remaining notwithstanding Simpson's objections, also constituted a violation of *California Penal Code* ' 602(l) which defines as a trespass:

> "Entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession".

The record herein reflects that Ms. Simpson continued to object to Appellant's entry even after Appellant was fully within the house (Exhibit "B", p. 3).

For these reasons, Appellant's actions in entering the home were illegal.

> "Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by a fine not exceeding Ten Thousand Dollars ($10,000.00), or by imprisonment in the state prison or in a county jail not exceeding one year, or by both such fine and imprisonment."

California Penal Code ' 240 defines assault:

> "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

Appellant had no lawful justification or reason to force entry or use force on Simpson. There was no crime or emergency situation justifying such a forceful entry, or use of force. In light of that, Appellant's actions in pushing his way in (and injuring Ms. Simpson in the process), as well as pushing and choking her back into the room, and throwing her down, constituted assault by a public officer under color of authority.

(3) Battery.

California Penal Code ' 242 defines battery as:

> "... any willful and unlawful use of force or violence upon the person of another."

Appellant's forced entry into the premises and use of force on Ms. Simpson was intentional. It was also unnecessary and not justified under any legal authority or Department policy. The use of force to effect entry was therefore illegal and constituted battery.[7]

[7] As stated in *Witkin*, California Evidence 3d, ' 158, dealing with the degree of proof required in civil cases, "... even when the theory of the case involves the accusation of a crime, the burden of proving the crime ... is met by a *preponderance of the evidence*; i.e., the high degree of proof demanded in criminal cases is not required in civil cases, even on *the issue of crime*. Cooper v. Spring Valley Water Co. (1911) 16 Cal. App. 17, 21, 116 P. 298 ...." See also Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 564, 112 L.Ed.2d 755 (1991).

3.

Violation of Department Policy Regarding Runaways

ZZZZZ Police Department Policy ' 5.41C.7.b provides as follows:

> "If the located person is a runaway juvenile from the City of ZZZZZ, or any other jurisdiction, the officer/investigator shall:
>
> 1. Contact the parent or legal guardian to take control and custody of the juvenile.
> 2. Contact an adult relative or other adult acceptable to the parent to take control and custody of the juvenile.
> 3. If the parent or guardian is unable or unwilling to take custody of the juvenile, Operation Safehouse is to be contacted and shelter arranged.
> 4. If the runaway juvenile alleges physical or sexual abuse in the home of the parent or guardian, Child Protective Services shall be contacted pursuant to Section 300 and all other pertinent subsections of the Welfare and Institutions Code.
> 5. In the event the officer/investigator is unable to accomplish the placement of the juvenile using the steps above, the officer/investigator is to take whatever other reasonable action may be necessary after consultation with a supervisor." (Emphasis added.)

It is alleged that Appellant failed to consult with a supervisor after he encountered resistance to accepting the second juvenile at the second group home.

Appellant was apparently aware of this policy because he did contact a supervisor when he initially met resistance at the first group home (R.T. 254:3-15).

There is no question but that Simpson objected and refused to take the second juvenile in throughout this Incident. As a matter of fact, even after Appellant forced his way into her group home, choking her and throwing her to the ground in the process, she still persisted in objecting

and repeated that she could not take the juvenile, as noted on Page 2 of the Exhibit "B-1" transcript.

In his Internal Affairs interview, Appellant asserted that he did consult a supervisor, Sergeant xxxxx, referring to his contacts at and after the first group home. Appellant steadfastly refused to acknowledge that the situations at the two group homes were different (Exhibit "BB-1," pp. 63-66).

As a matter of fact, the two situations were quite different. Ms. Simpson refused to accede to Appellant's demands, bluffs and threats, and persisted in refusing to take the second minor back.

Before forcing his way into the second group home, Appellant should have consulted with a supervisor who hopefully would have been more cool-headed and resourceful. Failure to make such consultation constituted a clear violation of Department Policy ' 5.41C.7.b.5.

4.

Violation of Department Policy ' 2.23 W

By Exceeding Lawful Peace Officer Powers by

Unreasonable, Unlawful, or Excessive Conduct

Appellant's actions were unreasonable for all of the reasons stated above, and specifically because of his refusal to listen to and follow up on Simpson's request to contact Juvenile Hall or Simpson's supervisor. Appellant's impatience and imperious attitude provoked an incident which was entirely avoidable. Rushing the situation (rather than calling a supervisor) resulted in a forced entry into the group home, and an unnecessary and excessive use of force. It was unreasonable and a violation of Department policy to choke and push Ms. Simpson approximately nine feet into the room and against the west wall in the entranceway, and then throw her to the east side and onto the floor and metal railing. The distance involved and the resulting injuries to Simpson (as shown in Exhibits "V", "W", and "X") were unreasonable, excessive and unlawful. The entire use of force was unreasonable and unlawful in this situation because force is not an appropriate way to effect compliance with an officer's requests, absent other circumstances.

Appellant had already made an unauthorized entry and violated Department policy when he commenced entering the house. That entry, and the pushing of the door into Ms. Simpson, was without justification, and she was fully justified in resisting that entry, if she did. Continuing to batter Ms. Simpson after the entry, and efforts to intimidate and bluff her with threats of arrest, were also unreasonable and excessive.

As testified to by Sergeant xxxxx, as well as Captain Dana and Deputy Chief Wilson, Appellant had other options in this situation. He could have contacted the Probation Department and/or Children's Protective Services to effect placement. It was unreasonable not to do so.

5.

Discourteous Conduct Towards Breata Simpson

It seems almost silly to refer to Appellant's conduct in this matter as merely "discourteous". It was extreme discourtesy, at a minimum, to refuse to even listen to Ms. Simpson's requests that Appellant contact the Probation Department or her own supervisor, and to tell her that someone might need to take the juvenile, but they would need to take him from the second group home because "... we're not driving all over the county". Appellant's rudeness and lack of courtesy is apparent throughout, but is the least of the problems with Appellant's conduct in this Incident.

6.

APPROPRIATENESS OF DISCIPLINE

Examining the record as a whole, terminating Appellant was and is appropriate under these circumstances. This conclusion is reached based upon the Incident involved herein, Appellant's prior record, and his personal make-up as reflected in this record.

It would serve no useful purpose to reiterate the details of this Incident involving the two runaway juveniles. Suffice to say that Appellant's conduct violated the law, Department policy, good judgment and common sense. His actions needlessly provoked an unfortunate incident involving Ms. Simpson.

The methods he used in effecting "return" of the first juvenile to the first group home location is also extremely questionable. This action was not charged by the Department, but is certainly relevant to the overall question as to whether or not Appellant's termination was appropriate. The bluster and intimidating tactics used on the first group home supervisor was admittedly temporarily effective, but represents one more illustration of Appellant's apparent need to have his authority accepted without question B whether or not his authority is being properly exercised or not.

Had the incident involving Ms. Simpson been an isolated event and an aberration in Appellant's police career, it might have been appropriate to attempt to further train and counsel Appellant after imposing some discipline less than termination. Unfortunately, that is not the case here.

As memorialized in Appellant's Personnel File (Exhibit "D"), and as outlined by the testimony of Deputy Chief Wilson in this Hearing, Appellant's prior record almost prophesied an incident such as the one involving Ms. Simpson.

As early as August, 1996, Appellant's performance evaluations were critical of his judgment when his authority was challenged. It was noted that he loses sight of the spirit of the law and views matters in terms of "black and white".

In his October, 1998 Evaluation, Appellant's judgment was again criticized, as was his propensity for "rushing" a situation, and again it was noted that Appellant tends to become very defensive when his authority is questioned. He had been previously admonished for discourtesy and improper procedures, and had been counseled in the areas of reporting procedures, courtesy, judgment, self-expression, and stability.

He had previously been disciplined for one incident at an emergency hospital when an ER doctor filed a complaint regarding what the doctor thought were inappropriate comments to the doctor's patient.

Another prior incident involved Appellant's actions regarding another doctor who complained of rudeness when, among other things, Appellant threatened to have the doctor's hospital closed down and hung up on the doctor.

This latter incident apparently occurred on April 9, 2000, just several days before the

incident involving Ms. Simpson.

In short, Appellant's Personnel Record is replete with warnings about an officer who just wanted to be obeyed, notwithstanding the circumstances or situation facing him.

There is absolutely no evidence in this matter that Appellant is a malevolent or evil person. His actions in this Incident, and record in general do, however, reflect that the Department was faced with an officer who was rigid in his outlook regarding policing and whose judgment and common sense left much to be desired. This was an explosive mix. Counseling and prior negative evaluations did not improve the situation.

As shown by the record herein, Appellant thought that his word constituted the law, and that any order he gave was a "legal order". Notwithstanding the impropriety of forcing his way into the group home, Appellant announced that any resistance to his order to "step back" constituted a crime. Similarly, a refusal to give her name and date of birth also supposedly constituted a crime because it "obstructed" or "delayed" an officer. Going further, and perhaps to the point of absurdity, Appellant threatened to arrest and take Ms. Simpson away from the group home (thereby leaving the minors alone), supposedly subjecting her to the further charge of child abandonment.

This Arbitrator has no training in analysis or psychotherapy but does have some experience in police disciplinary matters. Police work can be difficult and stressful. Yet officers must have the ability to deal with the public in a polite and appropriate manner, and within the law they are sworn to uphold and enforce. It is questionable whether Appellant is capable of doing that. Even during this Hearing, Appellant still asserted that his actions in this Incident were proper, and that he had done nothing wrong.

That attitude casts very serious doubts as to Appellant's suitability for law enforcement work, and would subject the City to an unreasonable risk of liability should it continue to employ him as a police officer.

Termination is appropriate under these circumstances.

7.

FINDINGS

1. The Department has shown by a preponderance of the evidence that during late night April 13 and early morning, April 14, 2000, while attempting to return a runaway minor to a group home, Appellant unjustifiably and illegally entered the home and used physical force against the on-duty group home supervisor, Breata Simpson, causing injury to her.

2. The Department has shown by a preponderance of the evidence that at the aforesaid time and place, Appellant used excessive force against Breata Simpson in the process of entering the group home she was supervising.

3. The Department has shown by a preponderance of the evidence that the use of such force, which was excessive, violated ZZZZZ Police Department Policy '' 4.30 C and 4.30 D.3.

4. The Department has not shown by a preponderance of the evidence that Appellant committed a criminal trespass pursuant to *California Penal Code* ' 602.5 with regard to this Incident.

5. The Department has shown by a preponderance of the evidence that Appellant committed an Assault by a Public Officer in violation of *Penal Code* ' 149 in forcing entry into the group home in this matter.

6. The Department has shown by a preponderance of the evidence that Appellant committed a battery in violation of *Penal Code* ' 242 on Breata Simpson, in the process of forcing entry into the group home.

7. The Department has shown by a preponderance of the evidence that Appellant violated ZZZZZ Police Department Policy ' 5.41 C.7.b.5 in failing to consult with a supervisor when meeting resistance in placing a juvenile at the xxxxx group home.

8. The Department has shown by a preponderance of the evidence that Appellant exceeded lawful peace officer powers by his unreasonable, unlawful, and excessive conduct in attempting to place the juvenile in the xxxxx group home.

9. The Department has proven by a preponderance of the evidence that Appellant's conduct toward Breata Simpson was discourteous in the extreme.

For the foregoing reasons, Respondent has proven those charges noted above by a

preponderance of the evidence. Under the circumstances, termination of employment is an appropriate discipline and it is affirmed. The Appeal is denied.

Dated: July 30, 2001

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ERNEST S. GOULD,
Arbitrator